Exhibit 12
Rec'd 10/10/01

Government Accountability Project

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COMMENTS OF RICHARD MILLER, POLICY ANALYST THE GOVERNMENT ACCOUNTABILITY PROJECT ON THE DEPARTMENT OF ENERGY'S PROPOSED RULE "GUIDELINES FOR PHYSICIANS PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKER'S COMPENSATION BENEFITS" (10 CFR PART 852) OCTOBER 10, 2001

I. INTRODUCTION

A. Overview of the Government Accountability Project-- The Government Accountability Project (GAP) is a non-profit law firm and public interest organization which represents the interests of workers who have suffered retaliation for raising concerns about the workplace. We advocate on behalf of groups of workers interested in the enforcement of safety and health standards and specific acts of individual whistleblowing. GAP has a nearly thirty-year history defending workers who raise health and safety concerns, either to an enforcement agency or as part of filing a claim for compensation. GAP has developed a program to track, educate and advocate on issues related to the implementation of the EEOICPA. GAP has offices in Washington, D.C. and Seattle, WA.

B. Statement of Purpose-- The purpose of these comments is to address our concerns about the Department of Energy's (DOE) proposed methods to implement Section 3661 (hereinafter Subtitle D) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). The EEOICPA is an essential first step to ensuring that the men and women who dedicated their lives to the defense of our nation during the Cold War are adequately and equitably compensated for the injuries they suffered during their employment in DOE facilities.

Subtitle D of the EEOICPA authorizes DOE to "enter into agreements with the chief executive officer of a State to provide assistance to a Department of Energy contractor employee in filing a claim under the appropriate State workers' compensation system." Under the EEOICPA, the DOE is to establish uniform federal regulations for evaluating requests for assistance in which a Physicians Panel will review the application and determine if "the illness or death... arose out of and in the course of employment." The DOE issued a proposed rule on September 7, 2001. A list of doctors with relevant expertise has been sent to the Energy Department by National Institute for Occupational Safety and Health.

GAP thanks the Office of Worker Advocacy of the Department of Energy for holding a hearing, and requests that rulemaking hearings be held in Oak Ridge, TN and Espanola, NM to take comment from affected workers, affected state compensation programs in order to understand how DOE's proposed rules will erect obstacles to achieving congressional intent.

II. THE PROPOSED RULE "GUIDELINES FOR PHYSICIANS PANEL DETERMINATIONS ON WORKERS REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKERS' COMPENSATION BENEFITS" 10 CFR PART 852

A. Overview of the Proposed Rule

The Department of Energy's (DOE) proposed rule sets forth the steps it will follow to provide assistance with state workers' compensation claims filed by DOE contractor employees. The proposed rule establishes a two-tiered process in which a claim is first submitted to the Program Office for initial screening to evaluate whether the claimant can meet the various eligibility requirements under state worker compensation laws. Eligibility requirements will be incorporated in Memorandum of Understanding (MOU) with the states. If the claimant can meet the criteria, then the Program Office will submit the application to the physician's panel for the evaluation of work relatedness. Either determination may be reviewed by the Office of Hearings and Appeals.

Section 852.5 of the proposed rule establishes minimum criteria that a claimant's application must meet prior to being submitted to the physicians panel:

1) The application must be filed by or on behalf of a former DOE contractor employee;

2) The application must demonstrate that the illness or death was related to the claimant's employment; and

3) The application must meet the conditions of the MOU with the State. Section 852.6 states that the MOU with the State will identify the applicable criteria used to determine the validity of a workers' compensation claim within that State and adopt that criteria for the initial screening process by the Program Office.

Since the specific state eligibility criteria are not included in the Proposed Rule, we are forced to comment on suspected criteria, rather than having actual knowledge of what the criteria would be. This lack of clarity is a violation of Executive Order 12988 on Civil Justice Reform which states that Federal Agencies will "provide a clear, legal standard for affected conduct." DOE should publish the criteria listed in each MOU so that we can address the MOUs directly.

B. Comment on Initial Screening Process

The proposed rule contravenes legislative intent to establish uniform federal standards to determine a claimant's eligibility by inserting state workers' compensation criteria as a pre-requisite for federal assistance. This is particularly problematic where DOE has control over its self-insured contractors. Defenses such as statutes of limitations and disputes over who is the last injurious employer have no place in a program which is intended to be compassionate and which its sponsors intended to solve a grave inequity suffered by nuclear workers. The text of Subtitle D places three simple commands on the DOE:

1) DOE is to direct its contractors to accept (not contest) state worker compensation claims deemed meritorious on a medical basis. Subtitle D requires that DOE disallow legal costs, through its power of procurement, to contractors who do challenge claims;

2) In those cases where a Physicians Panel finds that the illness "arises out of the course of employment," DOE should reimburse contractors for the costs of the claim; and

3) DOE is to enter into Memorandum of Agreements with states to facilitate this process.

DOE's proposed rule defeats legislative intent by erecting employer defenses under state workers' compensation law that claimants would already confront without the assistance from the DOE program. DOE's proposed rule is of limited or no value to a claimant. I can think of no one who would not have already won under existing state law that will now be eligible for state worker compensation through the assistance of DOE. Under the proposed rule DOE's assistance is not assistance at all. Rather DOE has created an unnecessary barrier that will further frustrate an already difficult process. I challenge DOE to identify those particular cases that would benefit from DOE's assistance, especially those where the claimant has been rejected by the state.

DOE, in the preamble to the draft rule, asserts that the intention of the new federal law was not to create a uniform federal system of eligibility for benefits under state compensation laws. The rule states "the Act does not require DOE to prescribe such standards" and "there is nothing in the text of the Act or the legislative history indicating that Congress intended to bypass State law." We disagree.

First, it is crucial to distinguish what Congress did not do. Congress did not give DOE the specific statutory authority to interpret the standards of up to 50 different state workers' compensation systems. Nor did Congress give the DOE the legal authority to condition the Physicians Panel's review upon this federal agency's interpretation of state law. Furthermore, DOE does not have any legislative direction from Congress to use Memorandum of Agreements to impose state criteria as a prerequisite to submitting a claim to a Physicians Panel or to impose state criteria for occupational causality on the Physicians

Panel. In fact, the DOE proposed rule defies congressional intent by imposing numerous obstacles contained in state workers' compensation programs that Congress sought to circumvent through the federal assistance program in Subtitle D of EEOICPA.

On the other hand, there is clear history from both the legislature and the executive that Congress intended to create a uniform system of compensation and these regulations fail to address that congressional intent. The President's National Economic Council report issued on March 31, 2000, declared that state workers' compensation systems were found to have numerous limitations with respect to compensating workers for occupational illnesses. Additionally, the report found that state workers' compensation systems are particularly ill-suited to provide worker compensation for occupational disease, due to statutes of limitations, varying and difficult burdens of proof with respect to causation and proving which is the last injurious employer when many contractors worked at DOE sites. The report was submitted to Congress and served as the foundation for altering DOE's and its contractors' posture with respect to challenging state workers' compensation claims. Congress did not preempt state compensation laws, instead it created a means of working around these laws for a narrow class of former DOE contractor employees.

The nature of the problem with state compensation programs and the need to solve it federally was underscored by the Administration and by the congressional sponsors of this law. Assistant Secretary of Energy David Michaels during his testimony before the Senate Committee on Health, Education, Labor and Pensions (HELP) on May 15, 2000 (S. Hrg. 106-532), stated, "given the inherent differences among state workers' compensation systems, the [National Economic Council] working group concluded that a DOE contractor worker cannot expect the same treatment in any two states, no matter how similar the illness, facility, work and income rate."

The Bureau of Workers' Compensation for the State of Ohio stated at the May 15 Senate HELP Committee hearing that "while we believe workers' compensation should, without a doubt, be regulated at the state level, this specific instance could benefit from federal assistance."

Senator George Voinovich stated to a panel of the House Judiciary Committee during a hearing on September 21, 2000, that "many of these workers have tried to seek restitution through their state bureaus of workers' compensation. Unfortunately, the vast majority of these claims have been denied,... denied because state bureaus of workers' compensation do not have the facilities and/or resources necessary to adequately respond to the occupational illnesses unique to our defense establishment."

Congressman Mark Udall also referred to the need for a "efficient, uniform, and adequate system of compensation" in his testimony before the Judiciary Panel.

Congresswoman Marcy Kaptur of Ohio stated, "the only practical compensation program for these workers is a federal program. The numerous differences between state

compensation programs would result in inequitable treatment of workers in similar situations. For fairness sake, a federal workers' compensation program for these workers is imperative." Congresswoman Kaptur goes on to state that "the workers suffering from these diseases are a federal responsibility. They worked in our national defense industry. They suffer because of that work.... These Cold War heroes deserve to be compensated for their suffering and their loss, and they should be compensated equitably. That cannot be done if their compensation is determined under 50 different state laws. Equity demands federal jurisdiction."

During the same hearing Congressman Whitfield stated, "I urge the Subcommittee to give these sick workers or their families a meaningful compensation package that acknowledges the damage done and treats their claims in a timely and equitable manner by a government agency that has experience in processing these types of claims.... My constituents don't understand jurisdictional problems and they don't understand why their government seems reluctant to compensate them for illnesses resulting from exposure to hazardous materials they had no knowledge of or control over.... The government must assume its responsibility."

In 2000, the Administration proposed to Congress that diseases, other than those related to beryllium, radiation and silica, be evaluated by Physicians Panels through a DOE Office of Worker Advocacy. Congress responded by adopting this approach in Subtitle D of the EEOICPA. Congress instructed DOE to use its powers of procurement to assure payment for claims where workplace exposure contributed to the illness. Congress authorized DOE to bypass the obstacles in state workers' compensation systems by taking advantage of the fact that DOE would simply reimburse its self-insured defense and cleanup contractors through their government contracts and deny them reimbursement for legal costs if they challenged those claims deemed meritorious by a Physicians Panel.

Beyond statements at hearings, the "Findings" section of the EEOICPA point to the fact that "State workers' compensation programs do not provide a uniform means of ensuring adequate compensation." The law's "Findings" go on to state that considering "fairness and equity" the government should have an "efficient, uniform and adequate compensation" system. The "purpose" section of Section 3611 of the Act restates that position, again emphasizing that the compensation program is to be "timely, uniform, and adequate."

There is no legislative history to suggest that cancer/beryllium/silica claims should be addressed by a federal standard, while all other illnesses are <u>not</u> addressed by uniform federal criteria. Nowhere in any of the hearing records or floor statements does Congress draw that distinction. Rather, the congressional language speaks broadly of injury and the need for establishing uniformity. The Congress's continuous emphasis on the inefficient and inequality of the state workers' compensation systems and the need for the federal government to correct that system is clearly established through the statements of the drafters and supporters of this legislation.

The Preamble to the DOE proposed rule raises the question of how to address worker compensation claims where the DOE contractor or subcontractor is not self-insured, but is insured through a purchased insurance contract or participation in a special state fund. In the past, many DOE contractors purchased insurance from companies such as Aetna and Liberty Mutual. In these cases, as DOE points out, it does not have control over the insurance companies or the special state funds who can contest claims that are deemed work related by the Physicians Panel, and for this reason state compensation laws should be controlling.

DOE can step in to the vacuum in these circumstances and the pay the claim. DOE can reimburse insurers for the cost of paying these occupational disease claims, or DOE can arrange to hold insurers harmless for the cost of the claim and direct its current M&O/M&I contractors to pay the claims. These are workable solutions not mentioned anywhere in DOE's rulemaking notice, yet this is precisely the advice the DOE received from its federally chartered advisory committee on worker compensation.

DOE should be aware that its staff had prepared draft rules in June 2001 which adhered far more closely to legislative intent. These rules called for Physicians Panels to review claims after proof of employment had been validated. They did not require that any state criteria be applied to determination of eligibility. These determinations, after review by the Program Office Director, would be binding on the line programs. This approach costs more money, we admit, because the employer defenses would not be created to choke off claims. That may explain why DOE came up with a proposed rule which it estimates will only cost $3 million/year on average in occupational disease claims over the next 10 years. To put this estimate in context, the cost (in 1995 dollars) for fatal cancer case averages $240,000, and a non fatal cancer case averages $52,000 (Ashford, Caldart, Hattis and Stone, July 1996). Few will benefit.

We are attaching the June 8th2001 proposal to this testimony. We ask that the DOE inform us as to what happened during the rule making process that caused a reversal of DOE's June 2001 interpretation of the law. We would like to know who is responsible and who should be held accountable.

C. Comments on the Causation Standard Applied to the Physicians Panels

If an application is submitted to the physicians panel, the panel will determine "whether an illness arose out of and in the course of employment." The standard of proof is stated in Section 852.7(b) as "A reasonable finding that it is more likely than not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor caused the illness or death."

As Senator Fred Thompson, GAO, and others have found, DOE has not and does not today monitor, or monitor adequately, for exposure to many toxic substances and heavy metals which, absorbed or inhaled in sufficient quantity, could lead to the development of disease or illness. For this reason, there is going to be an added measure of uncertainty in evaluating claims where

there is not sufficient data. The absence of such data creates an insurmountable hurdle for claimants to demonstrate that is more likely than not that exposure led to disease.

We recommend that the word "caused" in Section 852.7(b) be replaced with the words "contributed, exacerbated, aggravated or caused" the illness or death. This better captures the range of possibilities contemplated in Subtitle D, which speaks to whether a disease "arose out of the course of employment". Moreover, this approach better reflects the medical decision-making process that occupational medicine physicians use in addressing causality of occupational illness.

Further, we strongly differ with the DOE proposal to substitute state based criteria for the Physicians Panels to use in establishing causality. The judgment of causality is a medical determination, not a legal determination. The medical, toxicological and biological factors will not vary from state to state. Physicians panels should only base their decisions on medically relevant factors, not legal or administrative inventions.

D. Recommendation

GAP recommends that the Program Office only require proof of employment as a prerequisite for Physicians Panel review when a employee alleges that the illness arose out of exposure to toxic substances. The DOE/state MOUs should provide for agreement, whenever possible, to allow employers to exercise their right to decline to contest a worker compensation claim under DOE direction, with the understanding that DOE will reimburse self-insured contractors, hold insurers harmless or reimburse state funds. GAP also fully supports the recommendation of the Worker Advocacy Advisory Committee stated in their letter of August 31, 2001: "In particular, state statutes of limitation, specific disease exclusions, increased burdens of proof when occupational disease claims are made, or rules governing last injurious exposure or apportionment has no place in the physicians panel determinations of the legitimacy of these claims under EEIOCPA."

GAP also recommends that the rule adopt a revised standard of causation for occupationally induced illness. It should state that the Physicians Panel should determine whether the exposures "contributed, exacerbated, aggravated or caused" the illness or death.

E. Request for Disclosure

DOE is requested to place all memoranda and documents in the public docket which led to the development and subsequent rejection of the staff proposal of June 2001. Further, we request the disclosure in the public docket of all documents which led to the issuance of the proposed rule in September 2001.

Attachment to the Testimony of Richard Miller, Policy Analyst,
Government Accountability Project

Contents: June 8, 2001 DOE staff draft of the Physician Panel Rule

[Billing Code 6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 852

RIN 1901-AA90

Guidelines for Physician Panel Determinations on Worker Requests for Assistance in Filing For State Workers' Compensation Benefits

AGENCY: Department of Energy

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) is proposing guidelines for the operation of physicians panels under Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000. If provided for in an agreement between DOE and a State, a DOE contractor employee's request to DOE for assistance in filing a claim for State workers' compensation benefits would be referred by DOE to a physicians panel in order to obtain an expert opinion on whether the employee's illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility.

DATES: Submit comments on or before **[insert date 30 days from the date of publication of this notice in the Federal Register]**.

ADDRESS: For further information contact Judy Keating, Office of Environment, Safety and Health (EH-8), U. S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585; telephone: 202-586-7551. E-mail: judy.keating@eh.doe.gov

SUPPLEMENTARY INFORMATION:

I. Introduction

The Energy Employees Occupational Illness Compensation Program Act of 2000 ("Act")(Pub. L. No. 106-398) establishes a program for compensating covered workers made ill during nuclear weapons production for the Department of Energy (DOE). Workers with certain illnesses, including chronic beryllium disease, certain cancers and silicosis, may be eligible for specified benefits under the program. Workers with other illnesses that may be related to workplace toxic exposures will be expected to apply for compensation through their respective state workers compensation systems. Subtitle D of the Act authorizes the Secretary of Energy to enter into an agreement with each State to provide assistance to a DOE contractor employee in filing a claim under that State's workers' compensation system. If, under such an agreement, an applicant for assistance submits reasonable evidence that the illness or death of a covered employee was related to employment at a DOE facility, then DOE is to submit the application to a physicians panel established under the Act to make a determination on the cause of the illness or death. The Act gives DOE the authority to specify the number of physicians panels required, the number of physicians per panel, and each panel's jurisdiction. It vests the power to appoint members of physicians panels in the Secretary of Health and Human Services.

Section 3661(d) of Subtitle D of the Act provides that a physicians panel must determine "under guidelines established by the Secretary [of Energy], by regulation" whether the illness or death of the contractor employee for whom an application has been filed "arose out of and in the course of employment" by DOE and from "exposure to a toxic substance" at

a DOE facility. DOE is proposing these guidelines for physicians panel determinations, as required under section 3661(d) of the Act.

II. Background

Since World War II, hundreds of thousands of people have worked in the nuclear weapons production and testing programs of the DOE and its predecessor agencies. Federal nuclear activities have been explicitly recognized under Federal law as activities that are ultra-hazardous. Nuclear weapons production and testing have involved unique dangers, including potentially catastrophic nuclear accidents that private insurance carriers have not covered. Since the inception of the nuclear weapons program and for several decades afterwards, a large number of nuclear weapons workers at DOE sites were put at risk without their knowledge and consent for reasons that, documents reveal, were driven by fears of adverse publicity, liability, and employee demands for hazardous duty pay. Many previously secret records have documented unmonitored exposures to hazards at DOE facilities, and continuing problems at these sites across the Nation, where since World War II, the DOE and its predecessor agencies have been self-regulating with respect to nuclear safety and occupational safety and health. No other hazardous Federal activity has been permitted to be carried out under such sweeping powers of self-regulation.

In the face of mounting evidence linking current and former DOE contractor workers' illnesses and deaths to exposure to hazardous substances at DOE facilities, DOE supported the passage of legislation that would provide compensation to these workers. On October 30, 2000, Congress passed the Act, which includes, as its centerpiece, the Energy Employees Occupational Illness Compensation Fund, which provides compensation to workers for specific diseases covered under the Act, including chronic beryllium disease, silicosis, and radiogenic cancers. Workers will continue to be eligible for state workers' compensation benefits, including workers with occupational illnesses not eligible for benefits under the Act. Subtitle D of the Act, authorizes DOE to assist a worker in filing a claim under the appropriate State workers' compensation system. Furthermore, section 3661(e)(3)(B) of Subtitle D provides that DOE may not contest a worker's claim or award if a positive determination is made on the

worker's application, and, to the extent permitted by law, DOE may direct the DOE contractor who employed the applicant to not contest the claim or award.

In December, 2000, President Clinton signed Executive Order 13170, "Providing Compensation to America's Nuclear Weapons Workers" ("Executive Order" 65 FR 77487, December 11, 2000), principally to allocate responsibilities for implementing the Act among the interested Federal agencies. The Executive Order provides that the Secretary of Energy shall, pursuant to the Act, negotiate agreements with the chief executive officer of each State in which there is a DOE facility, and other States as appropriate, to provide assistance to DOE contractor employees on filing a State workers' compensation benefit claim (E.O. 13179, § 2(c)(v)).

Worker assistance under the Act is contingent upon an agreement between DOE and a State. DOE is working with the States to develop such agreements.

III. Section-by-Section Discussion of Proposed Rule

§ 852.1 What is the purpose of this part?

This section describes the purpose of the proposed rule, which is to implement the provisions of Section 3661(d)(3) of the Act by providing guidelines whereby physicians panels established in accordance with paragraphs (d)(1) and (d)(2) will determine whether the illness or death of the applicant for assistance with State workers' compensation benefits arose out of and in the course of employment by a DOE contractor and due to exposure to a toxic substance at a DOE facility.

§ 852.2 What is the scope of this part?

This section defines the scope of the proposed rule. The proposed rule directly addresses Sect. 3661(d)(3) of the Act by defining how each physicians panel will determine

whether an applicant's illness or death arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy Facility.

§ 852.3 What are the definitions of terms used in this part?

This section defines terms used in the proposed rule, and includes terms in common usage by the DOE and terms derived directly from the Definitions section of the Act (Section 3621(11)). The office that has been established by the DOE to implement the Act is referred to as the "Program Office" or "Office". At the time of issuance of this proposed rule, this office was named "the Office of Worker Advocacy." "Worker Advocacy Records" refers to system "DOE 10", which is the system of records specifically established by DOE to support the Energy Employees Occupational Illness Compensation Program.

§ 852.4 What is a physicians panel and how is it organized and operated?

This section defines the physicians panel and describes the process whereby the panel is set up, as specified in Section 3661(d) of the Act, including the role of DOE in deciding the number and composition of panels, and the role of the Department of Health and Human Services in selecting panel members. This section also defines the role of the physicians panel as that of providing DOE with impartial and independent determinations as to whether the illness or death of a State benefits applicant arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. Physicians panels may be asked to review new applications that have not undergone prior physicians panel review, or to re-examine applications that have already undergone physicians panel review, for reasons defined in section 852.14.

§ 852.5 What are the criteria that a physicians panel uses to determine whether an illness arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility?

This section sets forth common criteria that the physicians panel is to use in determining whether an illness arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility, regardless of the State in which the facility is located. In the usual instance, the criteria used to determine whether a medical condition is causally related to work is determined by the individual State. The Worker Advocacy Advisory Committee, which is the Federal Advisory Committee for the program created under the Act, urged DOE to establish common causation criteria for all DOE contractor employees entering this program, regardless of State of employment, based upon considerations of fairness and consistency. However, this proposed rule would not preempt the sovereignty of a State in deciding workers' compensation policy for workers in its jurisdiction: According to Subpart D of the Act, referral to a physicians panel, and thus application of these common criteria, depends upon agreement between DOE and a State. In addition, Sect. 852.5 of this proposed rule would require a panel to apply a State's causation criteria, if provided for by agreement between DOE and a State, and if instructed to do so by the Program Office.

Since DOE's contractor employees perform work on behalf of the Federal Government, the common criteria established for this program were based upon those used in the Federal employees' workers' compensation system, wherein a condition caused, contributed to or aggravated by work is considered to be causally related to work and thus potentially eligible for workers' compensation benefits.

This section also requires that panel determinations be by unanimous agreement of its members. It is the sense of DOE that panel determinations should be by a consensus of all members. Similar programs that depend upon consensus decisions have been highly successful, including the Fernald II Settlement Fund, which relies upon an Expert Panel of physicians to make causation determinations on cases of illness of employees of a former DOE contractor.

§ 852.6 How should a physicians panel resolve uncertainty in the evidence when making a determination regarding work-relatedness?

Because of the inherent difficulties for an applicant to prove that an illness is work related, as noted in the March 2000 National Economic Council Report and elsewhere, and the finding that many workplace exposures went unmonitored, Section 852.9 gives the benefit of the doubt to the applicant where the weight of the evidence for and against the application is roughly equal.

§ 852.7 What materials should a physicians panel review prior to making a determination?

Each physicians panel member will receive from the Program Office a complete set of materials related to the applicant's diagnosis, medical history, work history and history of exposures, so that the panel will have an adequate body of information for making a determination. The panel is to review all materials it receives from the Program Office.

§ 852.8 How may a physicians panel obtain additional information or a consultation that it needs to make a determination?

Section 852.8 anticipates that the panel may, on occasion, need additional information or consultations to make its determination. For expediency, documentation of evidence, maintenance of confidentiality, and records control, the panel must make all requests for additional information through the Program Office. The panel may request an interview with the applicant, if the panel believes that only the applicant can supply the necessary information. Based upon the experiences of similar physicians panels, including the aforementioned Expert Panel of the Fernald II Settlement Fund, it is anticipated that such a request will be unusual, but may be necessary in rare cases in order to obtain essential information. The panel can also request that the applicant undergo additional examinations or tests. This section also permits the physicians panel to request consultation with specialists in fields relevant to its deliberations, if needed, as provided for in Section 3661(d)(4) of the Act. The Program Office will maintain a roster of available specialists, selected by the Department of Health and Human Services, for this purpose.

§ 852.9 How is a physicians panel to carry out its deliberations and arrive at a determination?

Physicians panels will be required to convene for the purpose of discussing applications and arriving at unanimous determinations. Because it is anticipated that physicians panels will be spread out geographically, teleconferencing will be necessary and permitted. This system has worked well for prior physicians panels, such as the aforementioned Expert Panel of the Fernald II Settlement Fund.

§ 852.10 How must a physicians panel issue its determination?

In order to assure that the panel has made its determination based upon the relevant evidence and that the panel has provided the basis for its determination, the panel is required to identify the materials it has reviewed in making its determination, and to express the determination and its basis in a series of findings logically linking the evidence reviewed to the conclusions drawn. The panel is also required to cite, for the Program Office's consideration, any evidence to the contrary of the panel's determination, and to explain why the panel feels that this evidence is not persuasive.

§ 852.11 When must a physicians panel issue its determination?

Section 852.11 ensures that the panel will submit its determination in a timely fashion, within thirty working days of receiving application materials, unless granted an extension when additional information or a consultation is required, or for good cause.

§ 852.12 What precautions must a physicians panel take in order to keep an applicant's personal and medical information confidential?

Because records for review by the physicians panels contains confidential personal and medical information, this section is included to provide safeguards that physicians panels must follow for preserving the confidentiality of this information. The DOE has established a new system of Worker Advocacy Records in support of this program, and has recently published regulations regarding their uses and safeguards for maintaining their confidentiality (Federal Register Vol. 16, No. 95, p. 27300-27388, May 16, 2001). Safeguards include maintaining paper records in locked cabinets and desks, and not including personally identifiable information in published or unpublished reports, studies or surveys. The physicians panels are required to abide by these regulations.

§ 852.13 What actions must a physicians panel member take if that member has a potential conflict of interest in relation to a specific application?

In order to assure objectivity and fairness, each panel member is to report any real or perceived conflict of interest with regards to a particular application to the Program Office, and to cease reviewing the application pending instruction by the Program Office. The Program Office will then take appropriate actions to remedy the situation, generally referring the application to a different physicians panel, as outlined in Sect. 852.14(b)(2).

§ 852.14 When may the Program Office ask a physicians panel to re-examine an application that has undergone prior physicians panel review?

This section is responsive to the intent of Sect. 3661(e) of Subtitle D of the Act, which calls for DOE review of a panel's determination. This section outlines how a physicians panel can assist the DOE in this task, by providing the Program Office with independent reviews of prior panel determinations. It is anticipated that this will be helpful in situations where the Program Office believes the available evidence may be contrary to the original panel's determination, or where the Office obtains new information potentially impacting a determination, after the determination has been made.

Under this Section, the Program Office may refer a case back to the original panel or to a different panel, after the original panel has made a determination, if the Program Office obtains additional information whose consideration could result in a different determination, for quality assurance purposes, or if and additional review is otherwise necessary for the fair determination of the application. The Program Office may refer an application to a different panel, but not the original panel, if the Office has concerns that the available evidence does not support the original panel's determination, to remedy a conflict of interest, as described in Sect. 852.13, or to ensure consistency between panels in their decision-making.

§ 852.15 What new information must the Program Office give to a physicians panel performing a re-examination of a previously reviewed application?

When a physicians panel is to perform a re-examination of an application that has undergone prior physicians panel review, this section calls for the Program Office to provide the panel with all the information reviewed by the original panel, as well as any new information that the Office deems relevant to the re-examination.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This proposed rule would provide guidelines

for the operation and determinations of physicians panels established to provide expert opinion to DOE on the cause of a worker's illness or death. It would not impose costs or burdens on any small business or other small entity. DOE, therefore, certifies that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

No new collection of information would be imposed by this proposed rule. Accordingly, no clearance by the Office of Management and Budget is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this proposed rule deals only with physicians panel procedures, and, therefore, is covered under the Categorical Exclusion for rulemakings that are strictly procedural in paragraph A6 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have "federalism implications." Policies that have federalism implications are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government

and the States, or on the distribution of power and responsibilities among the various levels of government." On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's proposed rule and has determined that it does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The scope of this proposed rule is limited to defining how a physicians panel established under the Act will determine whether the illness or death that is the subject of an application for assistance in filing a claim under a State's workers' compensation system arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy Facility. .Referral of an application to a physicians panel can occur only by agreement with the applicable State, and the proposed rule would permit the Program Office to instruct the physicians panel to apply that State's statutory workers' compensation criteria, if provided for in the agreement. Thus, this proposed rule would not preempt State workers' compensation law. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues

affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed "significant intergovernmental mandate," and it requires an agency to develop a plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirement that might significantly or uniquely affect small governments. The proposed rule published today does not contain any Federal mandate, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. This rulemaking would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has not prepared a Family Policymaking Assessment.

V. Opportunity for Public Comment

Interested persons are invited to participate in this proceeding by submitting data, views or comments with respect to this proposed rule. To help the Department review the submitted

comments, commenters are requested to reference the paragraph(s) (e.g., 852.2(a)) to which they refer when possible.

Three copies of written comments should be submitted to the address indicated in the **ADDRESS** section of this notice. All comments received will be available for public inspection as part of the administrative record on file for this rulemaking in the Department of Energy Reading Room, Room 1E-090, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC 20585, (202) 586-3142, between the hours 9 a.m. to 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the **DATES** section of this notice of proposed rulemaking and all other relevant information in the record will be carefully assessed and fully considered prior to the publication of the final rule. Pursuant to the provisions of 10 CFR 1004.11, anyone submitting information or data which he or she considers to be confidential and exempt from public disclosure by law should submit one complete copy of the document, as well as two copies, if possible, from which the information has been deleted. The Department will make its own determination as to the confidentiality of the information and treat it accordingly.

identified and submitted in writing

List of Subjects in 10 CFR Part 852

Administrative practice and procedure, Government contracts, Hazardous substances, Workers' Compensation.

Issued in Washington, on

_____,

Assistant Secretary, Office of Environment, Safety and Health

For the reasons stated in the preamble, DOE hereby proposes to amend Chapter III of title 10 of the Code of Federal Regulations as set forth below:

1. Add Part 852 to read as follows:

PART 852 – GUIDELINES FOR PHYSICIAN PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKERS' COMPENSATION BENEFITS

Authority: Pub. L. 106-398, § 3661; 42 U.S.C. 2201 and 7101, et seq.; 50 U.S.C. 2401 et seq.

§ 852.1 What is the purpose of this part?

The purpose of this part is to implement section 3661(d)(3) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (Pub. L. 106-398). Section 3661 authorizes the Secretary of Energy to enter into an agreement with any State to provide assistance to a DOE contractor employee in filing a claim under the State's workers compensation system. If, under such an agreement, an applicant for assistance submits reasonable evidence that the application was filed by or on behalf of a DOE contractor employee or the employee's estate, and that the illness or death of the DOE contractor employee may have been related to employment at a DOE facility, then the DOE must submit the application to a physicians panel established under the Act. The role of the physicians panel is to determine whether the illness or death that is the subject of the application arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy Facility. Section 3661(d)(3) requires that the Secretary of Energy establish guidelines under which a physicians panel will make this determination.

§ 852.2 What is the scope of this part?

These regulations deal only with how a physicians panel determines whether an applicant's illness or death arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy Facility.

§ 852.3 What are the definitions of terms used in this part?

Act means the Energy Employees Occupational Illness Compensation Program Act of 2000, Public Law 106-398, § 3601 *et seq.*

DOE means the U. S. Department of Energy.

DOE contractor employee means a Department of Energy contractor employee within the meaning of section 3621(11) of the Act.

DOE facility means a facility designated by DOE as a Department of Energy facility within the meaning of section 3621(12) of the Act.

Program Office or Office means the Office of Worker Advocacy within DOE's Office of Environment, Safety and Health, or any other DOE office subsequently assigned to perform the program functions under subtitle D of the Act.

State benefits applicant or Applicant means a DOE contractor employee seeking assistance from the DOE in filing a claim under the applicable State workers' compensation system.

Worker Advocacy Records means the system of DOE records established by DOE to support the Energy Employees Occupational Illness Compensation Program

§ 852.4 What is a physicians panel and how is it organized and operated?

(a) A Physicians panel is a group of at least three physicians who have experience and competency in diagnosing occupational illnesses and who are appointed by the Department of Health and Human Services.

(b) The number of physician panels may vary at the discretion of DOE.

(c) The jurisdiction of each physicians panel is determined by DOE. DOE may change a panel's jurisdiction at its discretion.

(d) DOE assigns a panel member to a specific panel and may reassign a panel members.

(e) The purpose of each physicians panel is to provide DOE with an impartial and independent determination as to whether the illness or death of a State benefits applicant arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility.

(f) The Program Office may direct a physicians panel to make a determination on an application that has not previously undergone review by a physicians panel, or to re-examine an application that has previously undergone such a review.

(g) The physicians panel is to report its determination, and the basis for its determination, to the Program Office.

§ 852.5 What are the criteria that a physicians panel uses to determine whether an illness arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility?

(a) Except as noted in (b), a physicians panel must determine that an illness arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility, if the panel finds, by unanimous agreement of its members, that it is at least as likely as not that exposure to a toxic substance at a DOE facility:

(1) Caused or significantly contributed to the applicant's illness;

(2) Significantly aggravated or significantly accelerated the applicant's pre-existing condition; or

(3) Caused, significantly contributed to, or significantly accelerated the death that is the subject of the application.

(b) If provided for by an agreement between the DOE and a State, and if instructed to do so by the Program Office, the physicians panel must instead apply that State's statutory workers' compensation causation criteria in making its determination.

§ 852.6 How should a physicians panel resolve uncertainty in the evidence when making a determination?

The physicians panel should resolve uncertainty caused by contradictory evidence on the relevant issues (e.g.; exposure level or location, diagnosis, scientific evidence for causation) by finding in favor of the applicant where the evidence supporting the application and the evidence controverting the application are of equal weight.

§ 852.7 What materials should a physicians panel review prior to making a determination? The physicians panel should review all records relating to the application that are provided by the Program Office. Such records may include:

(a) Medical records;

(b) Employment records;

(c) Exposure records;

(d) Job history obtained by interview with the applicant;

(e) Medical Examiner's report or Coroner's report and death certificate;

(f) Workers' compensation records;

(g) Medical literature or reports; and

(h) Any other records or evidence pertaining to the applicant's request for assistance.

§ 852.8 How may a physicians panel obtain additional information or a consultation that it needs to make a determination?

If, after reviewing all materials provided by the Program Office, a physicians panel finds that it needs additional information or consultation with a specialist in order to make a determination, it must request this through the Program Office. A physicians panel may request:

(a) An interview with the applicant if the panel believes only the applicant can provide the necessary information.

(1) The panel must create a transcript or detailed notes of the interview, and submit the transcript or notes to the Program Office.

(2) The panel has the authority to request sworn testimony of the applicant.

(b) That the applicant undergo additional examinations or clinical tests if the panel considers such examinations or tests to be essential for rendering a determination.

(c) Consultation with specialists in fields relevant to its deliberations.

(d) specific articles or reports, or assistance searching the medical or scientific literature.

(e) other needed information or materials.

§ 852.9 How is a physicians panel to carry out its deliberations and arrive at a determination?

(a) Each panel member is to individually review all materials relating to the application, then,

(b) All panel members are to meet in conference in order to discuss the application and arrive at a common determination. Such a conference can be in person or by teleconference.

§ 852.10 How must a physicians panel issue its determination?

A physicians panel must submit its determination and the basis for its determination, in writing, to the Program Office. The determination and the basis for the determination are to be presented to the Program Office as findings of the physicians panel. These findings must be signed by all panel members in order to indicate their agreement with the findings. For panels that meet by teleconference, each panel member must sign and submit to the Program Office an identical set of findings. These findings are to include

(a) Each illness or cause of death that is the subject of the application

(b) For each illness or cause of death listed in (a)

(1) Diagnosis

(2) Approximate date of onset

(3) Date of death, where applicable

(4) Whether exposure to any toxic substance at at DOE facility as likely as not caused, signficantly contributed to or significantly accelerated the illness or death.

(5) If finding (4) is in the affirmative, the name of the toxic substance and, for each substance

(i) Affirmation that, in the panel's opinion, there is sufficient evidence in the scientific literature supporting a causal association between the toxic substance and the illness that is the subject of the application;

(ii) The approximate dates of exposure and the DOE facility or facilities at which the exposure occurred; and

(iii) Affirmation that, in the panel's opinion, the applicant's exposure was sufficient to have caused, aggravated or accelerated the illness that is the subject of the application

(6) If finding (4) is to the contrary, the reason(s) why, in the panel's opinion, exposure to a toxic substance at a DOE facility, more likely than not, did not cause, significantly contribute to or significantly accelerate the illness or death. Reasons may include:

(i) Insufficient evidence that the applicant was exposed to any toxic substance plausibly associated with the illness or death that is the subject of the application

(ii) Evidence that an applicant's exposure to a toxic substance was insufficient to have caused, aggravated or accelerated the illness or death that is the subject of the application.

(iii) Evidence that the applicant's exposure did not occur while the applicant was a DOE contractor employee.

(iv) Evidence that the applicant's exposure did not occur at a DOE facility.

(c) In addition to the above findings, the physicians panel should provide the program office with

(1) Any evidence to the contrary of the panel's determination, and why the panel feels that this evidence is not persuasive.

(2) A listing of information and materials reviewed by the panel in making its determination, including

(i) Information and materials provided by the Program Office

(ii) Information and materials obtained by the panel, such as scientific articles or the record of an interview with an applicant.

(3) Any other information the panel feels that the Program Office should have in order to understand the panel's deliberations and determination.

§ 852.11 When must a physicians panel issue its determination?

A physicians panel must submit its determination and the basis of its determination, in writing, to the Program Office within thirty working days of the time that panel members have received the complete application for review. The Office may grant an extension of the time period if the physician panel requires additional information or consultation in order to make a determination, or for good cause.

§ 852.12 What precautions must a physicians panel take in order to keep an applicant's personal and medical information confidential?

In order to maintain the confidentiality of an applicant's personal and medical information, each physicians panel must take the following precautions:

(a) After receiving applicant records from the Program Office, each panel member must maintain the confidentiality of these records, keep them in a secure, locked location, and, upon completion of panel deliberations, follow the instructions of the Program Office with regards to the disposal or temporary retention of these records.

(b) Each physicians panel must conduct its reviews and conferences in private, in such a fashion as to prevent the disclosure of personal applicant information to any individual who has not been authorized to access this information.

(c) Panel members may not release information to any third party, unless authorized to do so in writing by the Program Office.

(d) Panel members must adhere to the provisions of the Privacy Act of 1974 regarding Worker Advocacy Records.

§ 852.13 What actions must a physicians panel member take if that member has a potential conflict of interest in relation to a specific application?

(a) If a panel member has a past or present relationship with an applicant, an applicant's employer, or an interested third party that may affect the panel member's ability to objectively review the application, or that may create the appearance of a conflict of interest, then that panel member must immediately

(1) cease review of the application; and

(2) notify the Program Office and await further instruction from the Office.

(b) The Program Office must then take such action as is necessary to assure an objective review of the application.

§ 852.14 When may the Program Office ask a physicians panel to re-examine an application that has undergone prior physicians panel review?

(a) Under the following circumstances, the Program Office may direct the original physicians panel or a different physicians panel to re-examine an application that has undergone prior physicians panel review:

(1) If the Program Office obtains new information whose consideration could result in a different determination.

(2) For quality assurance purposes.

(3) In any other situation in which the Office feels that re-examination of an application is essential for its fair adjudication, except as specified in (b).

(b) Under the following circumstances, the Program Office may direct a different physicians panel, but not the original physicians panel, to re-examine an application that has undergone prior physicians panel review:

(1) The Office has concerns that the available evidence does not support the original panel's determination.

(2) The Office becomes aware of a real or potential conflict-of-interest of a member of the original panel in relation to the application under review.

(3) In order to assure consistency between panels.

§ 852.15 What new information must the Program Office give to a physicians panel performing a re-examination of a previously reviewed application?

The Program Office must give to a panel performing a re-examination

(a) All the information reviewed by the original panel; and

(b) Any new information that the Office deems relevant to the re-examination.